FILED

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

V. RALEE & CO., INC.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL UNION NO. , INTERNATIONAL BROTHER-HOOD OF ELECTRICAL WORKERS, AFL-CIO, and FRANK BENNER et al. ROBERT FITZGERALD,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

G. A. RAFEL & CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and FRANK BENNER and ROBERT FITZGERALD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, G. A. Rafel & Co., Inc., respectfully prays that a Writ of Certiorari be issued to review the order of the United States Court of Appeals for the Seventh Circuit in the above entitled case.

OPINIONS OF THE COURTS BELOW.

The decision and order of the National Labor Relations Board, quashing the Notice of Hearing issued in proceedings entitled: *Local Union No. 9, International Brotherhood of Electrical Workers, AFL-CIO, and its agents, Frank Benner and Robert Fitzgerald, and G. A. Rafel & Co., Inc.*, Cases No. 13-CD-64 and 13-CD-77, was entered on August 24, 1960. The decision and order is set forth in the Appendix hereto at pp. 4a-12a.

The opinion of the United States Court of Appeals for the Seventh Circuit, dismissing the Petition for Review of the Decision and Order of the National Labor Relations Board, filed therein by G. A. Rafel & Co., Inc., was entered on January 9, 1961, and is set forth in the Appendix hereto at pp. 13a.

JURISDICTION.

The order of the Court of Appeals sought to be reviewed was entered on January 9, 1961. This Petition for Certiorari is filed within ninety (90) days of the entry of said order.

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether or not an order quashing a notice of hearing issued under Section 10(k) under the Labor Management Relations Act, as amended, 29 U.S.C. 160 (k), is reviewable by the Court of Appeals under Section 10(f) of that Act, 29 U.S.C. 160 (f)?

2. Whether or not an order of the National Labor Relations Board quashing a notice of hearing issued under Section 10(k) of the Labor Management Relations

Act was a final order of the National Labor Relations Board within the meaning of Section 10(f) of that Act?

3. Whether or not the Court of Appeals erred in dismissing the Petition for review on the grounds that it was not a final order within the meaning of Section 10(f) of the National Labor Relations Act?

STATUTES INVOLVED.

The proceedings initiated before the National Labor Relations Board were based on alleged violations of 8(b) (4) (D), 29 U.S.C., Section 158(b) (4) (D) of the Labor Management Relations Act. Hearings were held under the aegis of Section 10(k), 29 U.S.C. 160 (k) of that Act.

The jurisdiction of the Court of Appeals in the Petition for Review filed therein was predicated upon Section 10(f) of that Act, 29 U.S.C. Section 160(f).

The provisions of these Sections are reproduced in the Appendix hereto at pp. 1a-4a.

STATEMENT OF THE CASE.

The petitioner filed charges on separate occasions, August 24, 1959, and December 2, 1959, with the Regional Director of the National Labor Relations Board alleging that respondents, Local No. 9, International Brotherhood of Electrical Workers, AFL-CIO, Frank Benner and Robert Fitzgerald, agents of Local No. 9, had violated Section 8 (b) (4) (D) of the Labor Management Relations Act, as amended, by inducing work stoppage in furtherance of a jurisdiction dispute with another labor organization, Local 134, International Brotherhood of Electrical Workers. Following investigation of the first charges, the Board's Regional Di-

rector issued a notice of hearing under the provisions of 10(k) of the Act. The second charge was filed during the pendency of the first hearing and, after the investigation thereof, the Board's Regional Director issued a second notice of hearing. He then consolidated the proceedings for purposes of hearing.

Hearings ensued between July 6, 1959, and January 13, 1960. Briefs were submitted by the parties. On August 24, 1960, the Board issued its decision and order quashing the notices of hearing. On October 20, 1960 petitioner filed a Petition for Review under the provisions of 10(f) of the Labor Management Relations Act seeking to have the Court of Appeals of the Seventh Circuit review the order and decision of the National Labor Relations Board entered in the above described proceedings. The National Labor Relations Board filed a motion to dismiss the petition for review contending that the order and decision of the National Labor Relations Board quashing the notices of hearing was not a final order within the meaning of 10(f) of the National Labor Relations Act and, therefore, not reviewable by the Court of Appeals under Section 10(f). Briefs were submitted by the parties to the Court of Appeals. On January 9, 1961, the Court of Appeals for the Seventh Circuit entered an order dismissing the Petition for Review on the grounds that the National Labor Relations Board order and decision was not reviewable by that court under Section 10(f).

REASONS FOR ALLOWANCE OF THE WRIT.

I

The Legislative History and Intent of Congress in the Enactment of Section 10(k) 29 U.S.C. 160(k) indicate that Congress meant 10(k) proceedings to be reviewed under Section 10(f) 29 U.S.C. 160(f).

The Legislative history of Section 10(k), relating to the question of review of 10(k) proceedings under 10(f), consists of the interpretation of a deletion in Conference of the original Senate Bill. Senate Bill 1126, 80th Congress, 1st Sess. (1947), empowered and directed the Board either to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute. The award of the arbitrator was given the same status and force as a *final order* of the Board in this Bill. The provision for an arbitrator was stricken in conference, H.R. Conf. REP 510, 80th Congress, 1st Sess. P. 57, and the Board was given the function of hearing and determining 10(k) cases. The National Labor Relations Board in interpreting this history stated in the *Juneau Spruce Corporation* case, 82 NLRB, at P. 656:

> ". . . (c) Congress intended the Board first to attempt to resolve the controversy by means of a Section 10 (k) determination. Thus, a Section 10 (k) hearing, has an effective function and the Board a definite responsibility thereunder to obviate the conventional unfair labor practice proceedings through a statutory device for expediting adjustment of such disputes . . ."

This quotation is footnoted at P. 657 of the *Juneau Spruce Corp.* case, *supra*, as follows:

". . . 6. The Legislative history (of the Taft-Hartley Act) supports this interpretation. H.R. 302, as reported, provided for an appointment of an arbitrator. The award of the arbitrator was to be determined the final order of the Board . . . In conference, the provisions for an arbitrator was deleted . . . The conference committee, it seems evident, gave that authority directly to the Board."

The Supreme Court in *National Labor Relations Board* v. ***The Radio and Television Broadcast Engineers Union Local 1212, International Brotherhood of Electrical Workers, AFL-CIO***, 364 U.S. 573, at P. 581 similarly interpretated the Legislative history of Section 10(k) of the Taft-Hartley Act. The court states at P. 581:

"The Taft-Hartley Act, as originally offered, contained only a Section making jurisdictional strikes an unfair labor practice. Section 10(k) came into the measure as the result of an amendment offered by Senator Morse which, in its original form, proposed to supplement this blanket proscription by empowering and directing the Board either to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute."

That the purpose of this amendment was to set up machinery by which the underlying jurisdictional dispute would be settled is clear and, indeed, even the Board concedes this much. The authority to appoint an arbitrator passed the Senate but was eliminated in Conference. The Board's position is that the change can be interpreted as an indication that Congress decided against provided for compulsory determination of jurisdiction disputes . . . . The obvious effect of this change was simply to place the responsibility for compulsory determination of the dispute entirely on the Board, not to eliminate the requirement that it be such a compulsory determination."

In deleting the provision relating to the appointment of arbitrator, the Conference likewise deleted the provision which made the award of an arbitrator a final order of the Board. In the use of the words "final order" relative to the arbitrator's decision, the framers of the Bill meant to equate a 10(k) determination by the arbitrator with other final orders of the Board. It seems evident that Congress, by placing the 10(k) determination entirely with the Board, did not thereby intend to diminish the consequence of such determination.

In the entire Labor Management Relations Act, the words final and order appear together but once, and that is in Section 10(f), "Any person aggrieved by a final order of the Board. . ." The structure of the Taft-Hartley Act and the relations between its several parts, would seem to indicate that the original Senate Bill intended a 10(k) determination to be reviewable under 10(f). Though there is an absence of any specific discussion in the Legislature history of the Taft-Hartley Act, why else would the words final order have been used to denominate the status of the determination of the arbitrator?

The Legislature history of 10(k) lends no credence to the Board's position that a 10(k) hearing for purposes of review under Section 10(f) is identical with the treatment accorded Section 9 (representation proceedings). The Wagner Act contains specific Legislative history relative to the review of Section 9 (representation proceedings). In *AFL* v. *NLRB*, 308 U.S. 401, the Supreme Court interpreted the language of the Wagner Act, read in light of its purpose and Legislative history, to ascertain whether the order for which the review in court is provided is contrasted with forms of administrative action differently described as a probable

means of excluding them from the review proceedings. The Supreme Court found in the Legislative history of the Wagner Act, an emphatic declaration that the provisions of the Bill for court review would not extend to the proceedings of Section 9. Further, Section 9(d) of the Act explicitly contains an injunction against review other than as part of an appeal from a 10(c) proceeding, an unfair labor proceeding.

Further, by including Section 10(k) in Section 10 which is entitled "Presentation of Unfair Labor Practices" and not in Section 9 "Representations and Allegations", it is reasonable to surmise that Congress intended to treat a 10(k) as an unfair labor practice hearing. By creating a separate provision under Section 10 and in not making 10(k) a part of Section 10(b), it is reasonable to say that Congress did not intend to provide the General Counsel or the Board with more preliminary investigatory authority under Section 10(k). As stated in *National Labor Relations Board* v. *The Radio and Television Union Local No. 1212, International Brotherhood of Electrical Workers, AFL-CIO*, *supra*, the National Labor Relations Board has been given a real and distinct function, *i.e.* responsibility for the making of a determination and award of jurisdiction among the disputants in an 8 (b) (4) (D) situation. Therefore, the tendency to equate a 10(k) proceeding to its investigatory functions under 10(b) has no statutory basis. In fact, the rules and regulations of the Board provide, in Sections 102.89 and 102.90, for initial investigation by the Regional Director to determine if the charge under 8 (b) (4) (d) has merit before the serving of the notices of hearing under Section 10(k).

The provisions of 10(k) are unique in the Labor Management Relations Act. Since they were included in the

Act subsequent to Section 10(f), the Legislative history of Section 10(f) has little direct bearing on the question. However, had Congress intended that 10(k) proceedings be unreviewable at their conclusion, it would have specifically provided for that. The Board's position that the 10(k) proceedings are non-reviewable under Section 10(f) is to be interpreted in light of its narrow conception of its function under 10(k). Since the Supreme Court's decision in *National Labor Relations Board* v. *The Radio and Television Engineers, supra,* it seems logical that 10(k) reviewability under 10(f) should lie as a concomitant of the responsibility of the Board described therein.

II.

An order quashing a notice of hearing in a 10(k) proceedings is a final order of the National Labor Relations Board within the meaning of 10(f).

The order quashing the notice of hearing entered by the Board, was tantamount to the dismissal of an unfair labor practice complaint. It has been held on numerous occasions that a dismissal of an unfair labor practice complaint is reviewable under Section 10(f). *Albrecht* v. *N.L.R.B.*, 181 F 2nd 652 (7th Circuit); *General Drivers et al* v. *N.L.R.B.*, 179 F 2nd 429 (C.A. 10); *Lincourt* v. *N.L.R.B.*, 170 F 2nd 306 (C.A. 3).

It has been the Board's contention that a 10(k) proceedings is equivalent to the investigatory stage in other unfair labor practices situations. Since, in that stage it has been held, that the decision of the General Counsel as to the issuance of a complaint is not reviewable under 10(f), the Board has held that the quashing of the notices of hearing under 10(k) is, also, non-reviewable, since it is a preliminary or an investigatory stage be-

fore the issuance of an unfair labor practice complaint alleging violation of 8(b) (4) (d). This concept naturally flows from the Board's limited view of its function under 10(k), and, in the opinion of the petitioner, has been disposed of by the Supreme Court opinion in *National Labor Relations Board* v. *The Radio and Television Engineers, supra.*

CONCLUSION.

We respectfully submit that the questions which we place before the Court in this Writ of Certiorari concerns the proper administration of the Labor Management Relation Act. A proper administration of justice requires supervision of the determinations of the lower echelons which in fact administer the system. Not only should there be review of the determinations of the lower echelons, which include administrative agencies, but that review should lie within a time period that has a reasonable nexus to the decision or order sought to be reviewed. Justice delayed is justice denied.

For the reasons set forth herein, we respectfully submit that the Petition for Certiorari ought to be granted.

Respectfully submitted,

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APPENDIX A.

STATUTES INVOLVED

29 U.S.C. Sec. 158(b) (4) (D)

(b) It shall be an unfair labor practice for a labor practice for a labor organization or its agents.

(4) (i) To engage in, or to endure or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, wherein either case an object hereof is:

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided

further, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a produce or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. Sec. 160 (f):

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the Circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restrain-

ing order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. Sec. 160 (k):

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

APPENDIX B.

128 NLRB No. 100 D-1667
Chicago, Illinois

Release Morning Aug 29 '60

United States of America
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND ITS AGENTS, FRANK BENNER AND ROBERT FITZGERALD

and Case No. 13-CD-64
G. A. RAFEL AND CO., INC. 13-CD-77

DECISION AND ORDER

This proceeding arises under Section 10 (k) of the National Labor Relations Act, which provides that:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen . . .

On April 24, 1959, and December 2, 1959, G. A. Rafel and Co., Inc., herein called Rafel, filed charges with the Regional Director for the Thirteenth Region alleging that Local Union No. 9, International Brotherhood of Electrical Workers, AFL-CIO, herein called Local 9, and its agents, Frank Benner and Robert Fitzgerald, herein called Benner and Fitzgerald, respectively, had engaged in and were engaging in certain unfair labor practices

within the meaning of Section 8 (b) (4) (D) of the Act. It was charged in substance that Local 9, Benner, and Fitzgerald had induced and encouraged employees of Rafel to engage in a strike or concerted refusal to perform services in the course of their employment with an object of forcing Rafel to assign particular work to members of, or employees who have been approved or cleared by, Local 9.

Thereafter, pursuant to Section 10 (k) of the Act and Sections 102.89 and 102.90 of the Board's Rules and Regulations, Series 8, the Regional Director investigated the charge in Case No. 13-CD-64 and provided for an appropriate hearing upon due notice. The hearing was held before Allan B. Haas, hearing officer, on July 6, 13, and 21, 1959, and before Herbert Borovsky, hearing officer, on various days between July 27 and December 3, 1959, at which time the hearing was recessed. On December 29, 1959, the Regional Director, having investigated the charge in Case No. 13-CD-77, consolidated the two cases and provided for appropriate hearing thereof upon reconvening of the recessed hearing. Thereafter, the consolidated hearing was held before the said Herbert Borovsky on January 11, 12, and 13, 1960. Rafel, Local 9, Benner, and Fitzgerald appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1] The rulings

[1] During the hearing, Rafel applied for special leave to appeal from certain rulings of the hearing officer. Because a determination would have required a review of the entire record, permission was denied without prejudice to Rafel's right to renew its application after the close of the hearing. Thereafter Rafel requested special leave to appeal, inter alia, from the hearing officer's (1) refusal to permit Rafel to adduce the testimony of four additional witnesses con-

of the hearing officer made at the hearing are free from prejudicial error and are hereby affirmed.[2]

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[1] (Continued)

cerning Case No. 13-CD-64, (2) refusal to recess or adjourn the hearing in Case No. 13-CD-64, (3) permitting Local 9's attorney to testify in the absence of Rafel and its attorney, (4) denial of Rafel's motion for a recess after the close of Case No 13-CD-64 and before starting the hearing on Case No. 13-CD-77 in order to allow Rafel additional time to bring in its witnesses, and (5) summarily closing Rafel's case in Case No. 13-CD-77 without the testimony of such witnesses. Even though the hearing was convened on 26 different days over a 6-month period during which this entire matter was at issue, Rafel failed, as more fully set forth hereinafter, to elicit testimony in support of its position that the object of Local 9's conduct was unlawful. There is no indication that any additional witnesses would have offered testimony which could alter our conclusions based on the undisputed facts of these cases. With regard to the testimony by Local 9's attorney, the record reveals that Rafel and its counsel voluntarily left the hearing in anger and thus waived the right to be present and cross-examine the witness. In any event, the testimony adduced is irrelevant to the issues to be resolved in this proceeding and has been disregarded in reaching our conclusion. Accordingly, Rafel's application for special leave to appeal from these rulings is denied. See **Fisherman's Cooperative Association, et al.**, 128 NLRB No. 11, footnote 14; **Kickhaefer Corporation**, 127 NLRB No. 162; **Houston Sash & Door Company, Inc.**, 127 NDRB No. 139.

[2] See footnote 1, **supra.** In addition, Rafel sought special permission to appeal from the hearing officer's refusal to disqualify himself because of bias, prejudice and animus against Rafel, as well as improper conduct. The application is also denied as to this ruling. In support of its contention, Rafel points to similar charges made on the record by counsel for Local 9. We find it difficult to understand how the hearing officer could have displayed such bias, prejudice, and animus against both parties in the same proceeding. Moreover, we note that both attorneys indulged in much abuse of the hearing officer, frequently disregarded his rulings and instructions, and often goaded him into losing his patience. While we do not agree with some of his rulings, we find the errors non-prejudicial since in no instance could a contrary ruling affect our conclusion herein.

Upon the entire record in these cases, the Board[3] makes the following findings:

1. Rafel is an Illinois corporation with its principal office and place of business in Chicago, where it is engaged in "inside" and "outside" electrical[4] contracting and engineering work. During the period from May, 1958, to early 1959, Rafel performed services (installed highway lighting, underground cable trenching, conduit, control cabinets, etc.) for the Illinois Toll Road Commission valued at over $400,000. During the same period, Rafel also performed similar services for other interstate and state highway systems valued at over $375,000. Accordingly, we find that Rafel is engaged in commerce within the meaning of the Act.[5]

2. Local Union No. 9, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of the Act.

3. The dispute.

A. The Facts.

Since 1946, Rafel has been engaged in "inside" electrical work in and about the Chicago area. Although not a party to any collective bargaining agreement, Rafel has customarily employed members of Local 134, Inter-

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[3] Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its authority in this case to a three-member panel.

[4] "Inside" electrical work is work done within private property lines, either on vacant land or within the confines of or on a building. "Outside" electrical work is done in public areas, such as streets, parks, etc. (for example, the installation of traffic signals).

[5] J. W. Saltsman doing business as Saltsman Construction Company, 123 NLRB 1176, 1179; Siemons Mailing Service, 122 NLRB 81.

national Brotherhood of Electrical Workers, AFL-CIO, for this work. Beginning in late 1957 or early 1958, Rafel bid on and was awarded a number of contracts to perform various jobs which fall within the definition of "outside" electrical work. Local 9 claims jurisdiction over the latter work in the Chicago area, whereas Local 134 claims jurisdiction over the "inside" work.

In April, 1958, shortly after Rafel began its first "outside" job, the two Locals discussed their jurisdictional claims with Rafel's General Superintendent, Robert Teets, and other supervisor, and all agreed that the work "belonged to" Local 9. Beginning at least on or about May 12, 1958,[6] Rafel made frequent requests to Local 9 to supply workers to perform the "outside" work, but Local 9 has consistently refused to do so, and these positions were reiterated during the hearing. Because of this refusal, Rafel has continued to employ workmen who are members of IBEW Locals other than Local 9 but has consistently stated to Local 9 that it would replace its present employees with members of that Local if Local 9 would refer its members for employment. Rafel on one occasion also attempted to secure "clearance" from Local 9 for some of its employees. All of Rafel's "outside" jobs have been completed without difficulty or are in progress,[7] except the first, which

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[6] This is the date of Rafel's first letter to Local 9 making the request in writing.

[7] There is no dispute as to any of these facts, and all matters concerning Rafel's requests and Local 9's refusals are substantiated by copies of the correspondence in evidence.

Rafel sub-contracted to another firm for completion.[8]

Benner and Fitzgerald appeared at least once at each of Rafel's "outside" job sites. Usually they requested the employees to show their union membership cards, but on a number of occasions they informed rank and file employees, either individually or in groups,[9] that they were working within Local 9's jurisdiction and recommended that they leave the jurisdiction in order to avoid serious difficulties with the union.[10] Admittedly, Benner and Fitzgerald communicated with the business agents of various Locals throughout the country and requested their assistance in getting their members to leave Rafel's employ. Moreover a number of persons were summoned to appear before Local 9's executive board to answer charges of violating Local 9's jurisdic-

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[8] Rafel contended that this job was subcontracted because of Local 9's claim to the work, whereas Local 9 asserts that Rafel subcontracted it for business reasons. It is unnecessary to resolve this conflict, inasmuch as these incidents took place more than 6 months before the filing of the charge in Case No. 13-CD-64. Certain other jobs were also subcontracted, Teets testified, this occurred because Local 9 refused to supply men or because the job had to be completed under Rafel's performance bond or the company would "lose out." There is no evidence that Local 9 was involved in any way in the decision to subcontract those jobs.

[9] Under the circumstances of these cases, statements to individuals, whether supervisors or employees, were almost certain to be communicated to other employees.

[10] Benner and Fitzgerald denied that they did anything more than ask to see the employees' membership cards. However, this seems unlikely in view of the pattern of their conduct, particularly the serving of summonses to appear before the executive board and the requests for assistance of business agents or other locals.

tion. While some of these were supervisors, a number of them were admittedly rank and file employees.

B. Contentions of the Parties

Rafel contends that by the above-described conduct Local 9 and its agents, Benner and Fitzgerald, violated Section 8 (b) (4) (D) of the Act. Local 9 and its agents deny such violation. They assert, *inter alia,* that there is no proof that they sought to compel Rafel to assign work to Local 9's members rather than to any other persons, relying on the fact that Rafel wanted to employ Local 9 men but could not not because of the Local's refusal to supply them[11] and citing the Board's decision in the *General Refrigeration Service Company* case.[12]

C. The nature of the dispute; applicability of the statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10 (k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8 (b) (4) (D) has been violated. In order to conclude that reasonable cause exists, the Board must find some evidence in the record showing (a) that a strike or a concerted refusal, or an inducement or encouragement of employees to engage in a strike or concerted refusal to perform services for any employer occurred; and (b) that any such action was for the

[11] Local 9, Benner, and Fitzgerald moved for dismissal on several other grounds. In view of our conclusion, we find it unnecessary to dispose of those contentions.

[12] Local 562, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (General Refrigeration Service Company), 124 NLRB No. 158.

purpose of forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class.

The evidence is clear that Rafel at all times has desired and wanted to employ Local 9 men, and it was only because of Local 9's persistent refusal to refer men that Rafel resorted to other sources for needed help. At no time has Local 9 indicated that if Rafel discharged its employees it would furnish replacements, although Rafel has clearly indicated its willingness to take such action. Under these circumstances, it can hardly be said Local 9 sought to force Rafel to assign work to its members or employees approved or cleared by Local 9 rather than to other persons. Rather, Local 9 asserts various reasons for its refusal, which relate primarily to the alleged character of Rafel and its alleged failure to meet the Local's working standards.

Under these circumstances, we conclude that the dispute in this case is not over the assignment of work within the meaning of Section 8 (b) (4) (D). It is therefore not a dispute within the meaning of Section 10 (k). Accordingly, we shall quash the notices of hearing.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, and on the entire record in the cases, the Board hereby orders that the notices of hearing heretofore issued in these proceedings be, and they hereby are, quashed.

Dated, Washington, D. C.

.....

Boyd Leedom, Chairman

.....

Stephen S. Bean, Member

.....

Joseph Alton Jenkins, Member
National Labor Relations Board

(Seal)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
January 9, 1961

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

G. A. RAFEL & CO., INC., Petitioner,
No. 13166 vs.
LOCAL UNION NO. 9, etc. AND NATIONAL LABOR RELATIONS BOARD, Respondents.

Petition for Review of an order of the National Labor Relations Board.

On consideration of the motion of the respondent, National Labor Relations Board, to dismiss petitioner's petition for review, the answer of petitioner thereto, the response of respondent Local Union No. 9, and the reply of respondent, National Labor Relations Board, in the above entitled matter;

And in appearing that the action of the National Labor Relations Board which petitioner requests this Court to review in this proceeding is an order quashing a notice of hearing under Section 10 (k) of the National Labor Relations Act, which action does not constitute a final order subject to review by this Court;

It Is Ordered that the motion of respondent, National Labor Relations Board to dismiss the petition for review is granted and petitioner's petition for review be and is hereby dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 879

G. A. RAFEL & CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; FRANK BENNER and ROBERT FITZGERALD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF OF LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; FRANK BENNER AND ROBERT FITZGERALD IN OPPOSITION.

QUESTION PRESENTED.

Is an order of the National Labor Relations Board quashing a notice of hearing under Section 10 (k) of the National Labor Relations Act, as amended, a final order so as to make it reviewable under the provisions of 10 (f) of said Act?

STATEMENT.

Petitioner herein filed unfair labor practice charges against Local Union No. 9, International Brotherhood of Electrical Workers, AFL-CIO and Frank Benner and Robert Fitzgerald, its agents, hereinafter, for convenience, collectively referred to as the "Union". The charge alleged that the Union had induced and encouraged a strike with the object of forcing Petitioner to assign work to the Union in derogation of the members of another group, *i. e.*, a jurisdictional dispute. Petitioner claimed that the Union had violated Section 8 (b)(4)(D) of the Act. Pursuant to the provisions of Section 10 (k) of the Act, the Board's Regional Director issued a notice of hearing and a hearing was held in accordance with the procedures outlined in said Section. The Board reviewed the Record adduced at the Section 10 (k) hearing and appropriately noted that "Before the Board may proceed with a determination of a dispute pursuant to Section 10 (k) of the Act it must be satisfied that there is *reasonable cause* to believe that Section 8 (b)(4)(D) has been violated [Pet. App., pg. 10 (a)] (Italics supplied). This was the statutory purpose of the Section 10 (k) proceedings. The Board noted that in order to find "reasonable cause" there must be some evidence adduced at the hearing that there was (a) inducement or encouragement and (b)

that such inducement or encouragement was for the proscribed object of forcing a work assignment to one group as distinguished from another [Pet. App., pgs. 10 (a) 11 (a)]. It concluded that "the dispute in this case is not over the assignment of work within the meaning of Section 8 (b)(4)(D)." [Pet. App., pg. 11 (a)]. It held, therefore, that this was not a dispute within the meaning of Section 10 (k) of the Act and accordingly, quashed the Notice of Hearing [Pet. App., pg. 11 (a)].

Review was then sought in the Court of Appeals for the Seventh Circuit under Section 10 (f) of the Act, which Section encompasses the statutory scheme created by Congress for obtaining judicial review of *final orders* of the National Labor Relations Board. On motion of the Union and the National Labor Relations Board, the Court of Appeals dismissed the Petition for Review on the ground that a National Labor Relations Board "order quashing a notice of hearing under Section 10 (k) of the National Labor Relations Act, . . . does not constitute a final order subject to review by this Court" [Pet. App., pg. 13 (a)].

ARGUMENT.

In seeking certiorari, Petitioner relies upon a decision of this Court issued on January 9, 1961 (*National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union, Local 1212*, 364 U. S. 573). There, this Court was confronted with the question of whether or not the Board was under a duty to award jurisdiction and the assignment of work to one of two competing unions before it could issue a cease and desist order in conjunction with finding a union guilty of violating Section 8 (b)(4)(D) of the Act. The Second Circuit [272 F. 2d 713 (1959)] refused to enforce the cease and desist order, agreeing with the respondent's contention and that of the Third[1] and Seventh[2] Circuits that the Board, having failed to make a jurisdictional determination under Section 10 (k) of the Act, could not proceed to enforce a cease and desist order growing out of a claimed violation of Section 8 (b)(4)(D). This Court, in reviewing the legislative history of Section 10 (k) noted that this section imposed upon the Board the compulsory determination of jurisdictional disputes.

Based upon the foregoing, Petitioner now contends that an order of the Board quashing a notice of hearing—as distinguished from a cease and desist order after a trial has been held under Section 8 (b)(4)(D) of the Act—is a final order within the meaning of the Act and, therefore, subject to review. Clearly, the *Radio and Television Broadcast Engineers* case did not so hold. An examination of the

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[1] *National Labor Relations Board* v. *United Association of Journeymen*, 242 F. 2d 722 (3rd Cir. 1957).

[2] *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 261 F. 2d 166 (7th Cir. 1958).

procedural facts in the matter and this Court's opinion reflects no support for Petitioner's claim. *Radio and Television Broadcast Engineers* commenced with a Section 10 (k) proceedings. Though it made no jurisdictional assignment, the Board initially issued a decision and determination of the dispute [119 NLRB 594 (1957)] holding that the respondent union therein was not entitled to force a work assignment; it directed the respondent to advise the Regional Director whether or not it would refrain from such activity. **This was the investigatory prelude to an unfair labor practice hearing under Section 8 (b) (4) (D) of the Act.** The respondent union chose not to comply and the hearing was then held after which the Board issued its cease and desist order [121 NLRB 1207 (1958)]. The enforcement which the Court of Appeals denied did not derive from the investigation conducted under Section 10 (k), but was solely the result of the cease and desist order following a formal hearing wherein the Board found the respondent union guilty of violating Section 8 (b)(4)(D) of the Act. As distinguished from the *Radio and Television Broadcast Engineers* case, the instant matter merely involved an order quashing the notice of a Section 10 (k) hearing. There had been no formal hearing relative to a claimed Section 8 (b)(4)(D) violation. The Board simply held—as the result of its investigation—that there was insufficient basis of a violation. This order of the Board quashing the Notice of Hearing is identical to the refusal of the Regional Director to issue a complaint when he finds insufficient basis of a violation.

It is a *sine qua non* that the jurisdiction to review actions of administrative agencies is legislatively and specially conferred [*AFL* v. *NLRB*, 308 U. S. 401, 404 (1940)]. Reviewability is treated in two sections of the Act and in two sections only. Except for the method of initiation of re-

view, the sections are basically identical. Section 10 (e) of the Act provides for enforcement in a Court of Appeals on a petition brought by the Board and Section 10 (f) permits an aggrieved party to bring a petition seeking review. In each instance, that which is sought to be reviewed must be a *final order* of the Board. And, clearly, a *final order* is an "order entered as the culmination of the procedure described in Section 10 (b) and (c) of the Act" [*Lincourt* v. *NLRB*, 170 F. 2d 306 (1st Cir. 1948)]. The quashing of a notice of hearing in a Section 10 (k) investigation is not such a "final order". It is no more final than the refusal to issue a complaint. The culmination of the procedure described in Section 10 (b) and (c) of the Act would be any orders of the Board growing out of its decision in a Section 8 (b)(4)(D) trial—whether those orders be of a cease and desist variety or whether the Board merely orders that the *complaint* be dismissed.

In passing, it is to be noted that the present Petition presents no novel question or one of substantial import. In fact, there is no disagreement between the Circuits, and the holding in the instant case is consistent with that which has been held universally. Illustratively, the Tenth Circuit has similarly held that the quashing of the notice of hearing under Section 10 (k) of the Act and the consequent refusal to issue a complaint under Section 8 (b)(4)(D), as here, did not constitute a reviewable final order [*Manhattan Construction Company* v. *NLRB*, 198 F. 2d 320 (10th Cir. 1952)]. Similarly, representation cases under Section 9 of the Act [*AFL* v. *NLRB*, 308 U. S. 401 (1940), *Cameron & Franks* v. *NLRB*, 207 F. 2d 775 (6th Cir. 1953), *Mower & Pratt* v. *NLRB*, 208 F. 2d 624 (2nd Cir. 1953)], and matters relating to representation cases are non-reviewable [*NLRB* v. *International Brotherhood of Electrical Workers*, 308 U. S. 413 (1940); *Inland Container Corporation* v.

NLRB, 137 F. 2d 642 (6th Cir. 1943); *Utah Copper Co.* v. *NLRB*, 136 F. 2d 485 (10th Cir. 1943)].[3] More germane to the instant inquiry, the Board's refusal to issue complaints in unfair labor practice cases is similarly non-reviewable [*Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306 (1st Cir. 1948); *General Drivers* v. *NLRB*, 179 F. 2d 492 (10th Cir. 1950); *Baudlow* v. *Rothman*, 278 F. 2d 866 (D. C. Cir. 1960); *Vapor Blast Mfg. Co.* v. *Madden*, 280 F. 2d 205 (7th Cir. 1960); *see also*, *Thompson Products* v. *NLRB*, 133 F. 2d 637 (6th Cir. 1943)].[4]

It is apparent that the instant Petition is based upon the Petitioner's confusion relative to the difference between the *refusal* to issue a complaint and the *dismissal* of a complaint. For example, Petitioner states that "It has been held on numerous occasions that a dismissal of an unfair labor practice complaint is reviewable under Section 10 (f)" (page 9). And to substantiate this, Petitioner relies upon the case of *Albrecht* v. *NLRB*, 181 F. 2d 652 (7th Cir. 1950). *Albrecht* involved an appropriate review following the issuance of a complaint, a hearing and the subsequent order of the Board dismissing the complaint, in part. It did not involve the refusal to issue a complaint. The words "refusal to issue" on the one hand and "dismissal" on the other

[3] These cases are, of course, to be distinguished from that of *Leedom* v. *Kyne*, 358 U. S. 184 (1958) involving an original suit brought in the district court to vacate a bargaining unit determination made by the Board in excess of its powers.

[4] *See also*, *Hourihan* v. *NLRB*, 201 F. 2d 187 (D. C. Cir. 1952), *cert. denied*, 345 U. S. 930 (1953), *rehear'g denied*, 345 U. S. 961 (1953), 346 U. S. 843 (1953), 346 U. S. 880 (1953), 346 U. S. 917 (1953), involving an unsuccessful attempt to obtain the issuance of a complaint by way of mandamus.

hand take on special meaning. True, the refusal to issue is a dismissal—but it is a dismissal of the *charge* following a preliminary investigation. The dismissal of a complaint, on the other hand, occurs following a plenary hearing. There the dismissal is based upon the merits and merely holds that the General Counsel did not substantiate his burden of proving that there had been a violation of the Act. This latter type of dismissal of a complaint is reviewable; the dismissal of a charge—whether it be called a refusal to issue or labeled the quashing of the notice of hearing—is clearly non-reviewable. The Section 10 (k) proceeding is nothing more than the preliminary administrative investigation and determination made for the purpose of attempting to resolve a dispute initially, or thereafter proceeding on the basis of an unfair labor practice hearing with full and complete litigation before a Trial Examiner, with review before the Board and with the right to have review then in a Court of Appeals. (See Board explanation in *Irwin-Lyons Lumber Co.*, 83 NLRB 341 (1949). While Section 10 (k) involves an interim step—designed to attempt to resolve inter-union disputes—in its ultimate form, it is no different than the conventional unfair labor practice investigation. As this Court has stated, the provisions of Section 10 (k) and the intent desired to be accomplished are exceedingly clear. It would certainly be reasonable to assume that if Congress had intended that the Section 10 (k) investigation be treated in terms of reviewability differently from the other investigations and refusals to issue complaints in unfair labor practices, then Congress in drafting Section 10 (k) would have so stated. Clearly, it did not so state, and clearly the Act does not permit the construction of the reviewability of non-final orders when jurisdiction to review acts of administrative agencies occurs by reason of legislative enactment alone.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Chicago, Illinois,
May 3, 1961.

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Office Supreme Court, U.S.
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No. 879

In the Supreme Court of the United States

OCTOBER TERM, 1960

G. A. RAFEL & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND FRANK BENNER AND ROBERT FITZGERALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

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G. A. RAFEL & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, AND FRANK BENNER AND ROBERT FITZGERALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing the petition for review (Pet. 13a) is not reported. The decision of the National Labor Relations Board (Pet. 4a–12a) is reported at 128 NLRB No. 100.

JURISDICTION

The decision of the court of appeals was entered on January 9, 1961 (Pet. 13a). The petition for a writ of certiorari was filed on April 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly concluded that an order of the National Labor Relations Board quashing a notice of hearing under Section 10(k) of the National Labor Relations Act is not a final order under Section 10(f) of the Act and is therefore not reviewable by the court of appeals.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A to the petition (Pet. 1a–3a).

STATEMENT

On April 24, and December 2, 1959, G. A. Rafel & Co., Inc., filed charges with the Regional Director of the Board alleging that Local 9, International Brotherhood of Electrical Workers had violated Section 8(b)(4)(D) of the Act by inducing work stoppages in furtherance of a jurisdictional dispute with another labor organization, Local 134, IBEW (Pet. 4a-5a). Following investigation of the charge filed on April 24, the Regional Director issued a notice of hearing with respect to the underlying dispute in accordance with the procedure prescribed by Section 10(k) of the Act. The second charge was filed during the pendency of the hearing, and, following its investigation, the Regional Director consolidated the two cases for hearing. Hearings were held under Section 10(k) between July 6, 1959, and January 13, 1960 (*ibid.*).

The evidence disclosed that since 1946 the Company was engaged in "inside" electrical work, and, although not a party to any collective agreement, customarily employed members of Local 134 for this work. In late 1957 or early 1958 the Company secured contracts to perform "outside" electrical work. Local 9 claimed jurisdiction over "outside" work in the area, while Local 134 claimed jurisdiction over "inside" work. In April 1958, after the Company began its first "outside" job, the two locals discussed their jurisdictional claims with Company officials, and all parties agreed that the work "belonged to" Local 9 (Pet. 7a–8a).

Beginning about May 1958, the Company made frequent requests to Local 9 to supply workers to perform the "outside" work, but Local 9 refused to do so. Because of this refusal, the Company continued to employ workmen who were members of IBEW locals other than Local 9, but consistently told Local 9 that it would replace its present employees with members of Local 9 if they were referred for employment. Local 9's agents, Frank Benner and Robert Fitzgerald, appeared at the Company's "outside" job sites where they requested employees to show their union membership cards, informed employees that they were working within Local 9's jurisdiction, and recommended that they leave the jurisdiction in order to avoid serious difficulties with the union. In addition, Benner and Fitzgerald communicated with various locals throughout the country and requested their assistance in getting their mem-

bers to leave the Company's employ (Pet. 8a–10a).

On August 24, 1960, the Board issued its decision. It noted that, "[b]efore the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated" (Pet. 10a). Finding that the evidence adduced at the hearing established that "the dispute in this case is not over the assignment of work within the meaning of Section 8(b)(4)(D)," the Board concluded that the present case did not present "a dispute within the meaning of Section 10(k)" (Pet. 11a). Accordingly, the Board quashed the notices of hearing issued under Section 10(k).

Petitioner thereupon sought to obtain review in the court of appeals of the Board's order quashing the notices of hearing. The court dismissed the petition for review on the ground that it had no jurisdiction, since the Board's order was not a "final order" within the meaning of the Act (Pet. 13a).

ARGUMENT

1. Section 10(f) of the Act provides that any "person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order" in the appropriate court of appeals. The question presented is whether a Board determination, quashing a notice of hearing under Section 10(k) of the Act, is "a final order of the Board" within the meaning of Section 10(f). This narrow question of statutory interpretation has arisen only once before in the over

thirteen years that Section 10(k) has been in the Act. In that instance, another court of appeals reached the same conclusion as did the court below, *i.e.*, that the quashing of a Section 10(k) notice of hearing is not a "final order." *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F. 2d 320 (C.A. 10). See also *Herzog* v. *Parsons*, 181 F. 2d 781 (C.A. D.C.), certiorari denied, 340 U.S. 810. We therefore submit that the issue is not appropriate for review by this Court.

The Board, with court approval, has consistently taken the position that the term "final order," as used in Section 10(f), refers to "an order as the culmination of the [unfair labor practice] procedure described in Section 10 (b) and (c) of the Act, as amended." *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306, 307 (C.A. 1). This conclusion is supported by the language and structure of the Act. Section 10(e), the companion to Section 10(f), empowers the Board to petition for enforcement of "such order," and, looking back to Section 10(c), where the term "order" is first used, it would seem to follow that "such order" means the order there described—*i.e.*, one issued at the conclusion of a formal unfair labor practice proceeding. Accordingly, attempts to obtain review in the courts of appeals of action short of a final unfair labor practice order—such as a Board representation determination under Section 9, or the General Counsel's refusal to issue a complaint based on an unfair labor practice charge—have uniformly failed. The cases cited by petitioner,

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[1] *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401; *National Labor Relations Board* v. *Electrical Workers*, 308 U.S. 413; *Lincourt* v. *National Labor Rela-*

permitting review of the dismissal of an unfair labor practice complaint (Pet. 9–10), are not to the contrary. In those cases, the Board dismissed the complaint after holding a formal unfair labor practice hearing, and thus its action represented a final disposition of the unfair labor practice case under Section 10 (b) and (c) no less than if an affirmative remedy had been granted.

The quashing of a notice of hearing in a Section 10(k) proceeding does not meet the above test of a "final order." As was recognized in *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union*, 364 U.S. 573, Section 10(k) is not part of the normal unfair labor practice machinery, but is instead a special procedure for obviating unfair labor practice sanctions through settlement of the underlying jurisdictional dispute. By virtue of Section 10(k), a complaint does not immediately issue upon a Section 8(b)(4)(D) charge which appears to have merit; further proceedings on the charge are tolled while the parties are afforded an opportunity to adjust the underlying jurisdictional dispute, to agree upon methods of adjustment, or to have the Board make a determination respecting the dispute. If the Board, after noticing the dispute for hearing under Section 10(k), finds that it has been settled or that the dispute did not in fact give rise to

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tions Board, 170 F. 2d 306 (C.A. 1); *General Drivers* v. *National Labor Relations Board*, 179 F. 2d 492 (C.A. 10); *Thompson Products* v. *National Labor Relations Board*, 133 F. 2d 637 (C.A. 6); *Laundry Workers, Local 221* v. *National Labor Relations Board*, 197 F. 2d 701 (C.A. 5).

a jurisdictional strike within the meaning of Section 8(b)(4)(D), it quashes the notice of hearing and the unfair labor practice charge is dismissed. Similarly, if the Board proceeds to determine the dispute under Section 10(k) and the parties comply with the determination, the unfair labor practice charge is dismissed. In both of these situations, the dismissal of the charge precludes the unfair labor practice case from reaching the stage of formal prosecution—and thus there is no final unfair labor practice order culminating proceedings under Section 10 (b) and (c). Only if, unlike here, the Section 10(k) procedure results in a Board determination of "the dispute out of which such unfair labor practice shall have arisen" and there is a refusal to comply with the determination, does the unfair labor practice case proceed to complaint and ultimate Board decision and order.

Contrary to petitioner's contention (Pet. 5–6), nothing in the legislative history of Section 10(k) compels the conclusion that an order quashing a notice of hearing under that provision satisfies the requirements of Section 10(f). As shown, both the language and purpose of Section 10(k) indicate that it was intended to serve a separate and preliminary purpose respecting jurisdictional disputes before the unfair labor practice provisions of the Act come into play. Moreover, when it added Section 10(k) to the Act, Congress did not, by amending the review provisions of Section 10 (e) and (f) or otherwise, indicate that it intended to expand the special and limited meaning which the term "final order" used in

those subsections had previously acquired. Indeed, Congress specifically rejected a proposal which would have achieved this result in a comparable situation by permitting Section 9 representation determinations to be reviewed under Section 10 (e) and (f). See Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 334, 560–561.[3]

2. If the Board's determination is reviewable, nevertheless the Board properly quashed the notice of hearing in this case. Before the Board may proceed to a Section 10(k) determination it must have reasonable cause to believe that Section 8(b)(4)(D) has been violated. The evidence here (see *supra*, pp. 3–4) shows that both the Company and Local 134 agreed with Local 9 that "outside" electrical work belonged to Local 9, and that the Company at all times desired to employ Local 9 men. But Local 9 persistently refused to refer men to the Company (Pet. 11a). In these circumstances, the Board could well conclude, as it did, that there was no dispute over the assignment of work within the meaning of Section 8(b)(4)(D), and thus no statutory justification for proceeding to a Section 10(k) determination. This result is not in conflict with *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union, supra.* There,

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[3] Petitioner relies (Pet. 6) on a footnote in *Juneau Spruce Corp.*, 82 NLRB 650, 656, note 6:

> H.R. 302, as reported, provided for the appointment by the Board of an arbitrator * * *. The award of the arbitrator was to have been deemed the final order of the Board. * * * In conference, the section was amended by deleting the provision for the appointment of an arbitrator. * * *

unlike in the present case, it was clear that the conduct giving rise to the dispute was within Section 8(b)(4)(D) (364 U.S. at 576). The Court held that, in such a situation, the Board was required to go on and make an affirmative determination of the underlying dispute. Where the circumstances do not come within Section 8(b)(4)(D) obviously the Board has no duty, and in fact no power, to make any determination of the dispute.

The Conference Committee, it seems evident, gave that authority directly to the Board.

It is clear, however, from this quotation itself, and from the portions of the footnote omitted in the quotation that the authority which the conference committee gave the Board was the power to arbitrate the underlying dispute. See *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union*, *supra*, 364 U.S. at 581–582. There is no indication in *Juneau Spruce* or in the committee reports that the conference committee intended to make the Board's Section 10(k) determination final in the sense of allowing review in the court of appeals. In fact, the elimination of the explicit finality provision from the bill in conference may point the other way. The question involved in *Juneau Spruce* was not the reviewability issue, but merely whether the Board had the power, when an 8(b)(4)(D) charge was filed, to issue a complaint under Section 10(b) instead of first hearing and determining the dispute under Section 10(k).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1961.

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